STATE OF MICHIGAN

COURT OF APPEALS

SALLY ANN ANDREWS,

Plaintiff-Appellee,

v

GLENN ALAN ANDREWS,

Defendant-Appellant.

UNPUBLISHED
March 11, 2008

No. 274338
Kent Circuit Court
LC No. 02-007296-DM

Before: Markey, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendant Glenn Andrews appeals as of right the October 18, 2006, judgment of divorce, in which the Kent Circuit Court imputed yearly income of $300,000 to defendant. The trial court awarded child support and spousal support to plaintiff Sally Andrews based on the imputed income figure and utilizing a formula found in the parties' prenuptial agreement. We affirm in part, reverse in part, and remand.

I. Facts and Proceedings

Plaintiff and defendant were married in Jackson Hole, Wyoming on October 30, 1993. They lived together until April 16, 2002. Before they were married, the parties signed a prenuptial agreement. The agreement provided that in the event of a divorce defendant would pay spousal support to plaintiff based on 20 percent of defendant's taxable income for a number of years equaling the number of years the parties had been married. The spousal support provision specifically provided:

> The amount of alimony to be paid by Glenn and received by Sally shall be determined by dividing Glenn's taxable income after the deduction of federal income taxes as *shown by his prior year's income tax return* by 12 and then multiplying the product by 20 percent. For example, if the taxable income after deduction of income taxes is $120,000.00, the amount of alimony for the following year would be $2,000.00 per month. *This amount shall be adjusted every year on the 1st of March by using Glenn's prior year's taxable income less the federal income tax paid.* For example, if, under the terms of this Agreement, alimony was due and payable for the year 1995, the alimony actually paid for January and February of 1995 would be determined by dividing Glenn's total after tax income for 1993 by 12, then taking 20 percent of that amount and paying

> that amount for January and February of 1995. The payments for March 1995, through February 1996, would be determined by dividing Glenn's after tax income for 1994 by 12 and then taking 20 percent of that amount. [Emphasis supplied.]

Throughout the parties' marriage, they were primarily supported by defendant's interest in the Vanda partnership. Defendant's income from Vanda was approximately $300,000 per year. Even with this income, the parties lived beyond their means, spending their entire income each year. After the parties' separation, defendant failed to file income taxes for 2001, 2002, and 2003, which resulted in a tax deficit of $444,000, including taxes and penalties. Defendant's parents later sued him in Florida on notes for debts of approximately $340,000. Instead of contesting the lawsuit, defendant allowed a default judgment to be entered against him. In satisfaction of the judgment, defendant signed over his interest in the Vanda partnership to his parents.

One of the primary issues during the bench trial was defendant's disposition of his interest in the Vanda partnership. Defendant testified that he did not sign over his interest in the Vanda partnership to avoid making tax payments, but at the same time conceded that he gave his parents his interest in the Vanda partnership because he would rather they have his money than the IRS, and he felt that he had no defense to their lawsuit against him. Defendant could not otherwise explain the need to give up this high income-producing asset to pay off a $340,000 debt.

During his trial testimony defendant made several references to the Vanda partnership interest as "my" income. He also testified that, in 2004, "his" portion of the Vanda partnership interest was $98,000, even though he had already turned it over to his parents. Further, defendant testified that he believes his parents will eventually return his interest in the Vanda partnership to him after his debts are paid.

Defendant's parents now control his bank account,[1] and they replenish the account with money whenever he has need. Although defendant believed that he signed notes on some of the money, he was unable to explain whether this money was a gift or a loan. Defendant's father purchased the truck defendant drives for his current employment, a position he procured after his interest in the Vanda partnership was transferred to his parents.

The trial court awarded sole physical (as a result of a stipulation) and legal custody of the parties' minor child to plaintiff. The trial court also found that defendant's testimony with respect to his interest in the Vanda partnership lacked credibility, and as a result, concluded that defendant voluntarily and in bad faith reduced his income by turning over his Vanda interest to his parents in order to avoid child and spousal support payments. The trial court averaged the income defendant earned from Vanda over the previous few years and added $40,000 per year for his new trucking job, which totaled $327,000. The trial court imputed income to defendant

[1] During the marriage plaintiff was responsible for the family's finances.

of $300,000 per year for both child support and spousal support. The court's judgment as it pertains to the spousal support payments provided:

> The Court hereby enforces the Prenuptial Agreement signed by the parties dated October 29, 1993. The Defendant/husband is ordered to pay spousal support to Plaintiff/wife, beginning September 1, 2006, the sum of $43,336.08 per year payable at the rate of $3,611.34 per month beginning September 1, 2006, until Plaintiff's remarriage, death of either party, or for a period of 105 months from September 1, 2006, whichever occurs first. Said payments shall be made through the Kent County Friend of the Court's office.
>
> The court is imputing income to Defendant/husband at $300,000.00 per year.

This appeal followed.

II. Analysis

We review a trial court's finding of facts underlying an award of both spousal support and child support for clear error. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992); *Stallworth v Stallworth*, 275 Mich App 282, 284; 738 NW2d 264 (2007). "A finding is clearly erroneous if this Court, on all the evidence, is left with a definite and firm conviction that a mistake was made." *Id.* We then review the trial court's discretionary rulings with respect to child support for an abuse of discretion. *Id.* "'An abuse of discretion occurs when a court selects an outcome that is not within the range of reasonable and principled outcomes.'" *Id.*, quoting *Borowsky v Borowsky*, 273 Mich App 666, 672; 733 NW2d 71 (2007).

A. Child Support

Defendant's sole argument on appeal with respect to child support is that the trial court's factual findings underlying the imputation of income were clearly erroneous. Regarding imputation of income, the Michigan Child Support Formula provides that a trial court has "discretion to impute income when a parent voluntarily reduces or eliminates income or when it finds that the parent has a voluntarily unexercised ability to earn." *Stallworth*, *supra* at 286-287, citing 2004 MCSF 2.10(A) and (B). In other words, in order to impute income on the basis of an unexercised ability to pay, the trial court must, by adequate fact-finding, determine that the party to which income is being imputed has "an actual ability and likelihood of earning the imputed income." *Id.* at 285. The requisite party's "voluntary" reduction of income can include an intent to reduce child support payments. *Id.* at 286. A finding of bad faith is not listed as a requirement for the imputation of income for child support. *Id.* at 286-287.

Here, the trial court found that defendant voluntarily and in bad faith reduced his income to avoid paying child support and spousal support. After a complete review of the record, we are not left with a definite and firm conviction that a mistake was made. *Stallworth*, *supra* at 284. Defendant's own testimony provided substantial evidence from which the trial court could infer defendant's bad faith and voluntary reduction of income.

First, defendant's testimony with respect to avoidance of IRS payments was inconsistent: he testified that he did not intend to avoid payments, then testified that he would rather his parents have the money than the IRS. Second, defendant's parents, to whom he transferred his Vanda interest, control his bank account and deposit money whenever he needs something. Third, defendant testified that he fully expected to regain his interest in the Vanda partnership as soon as his debt was paid. Thus, the transfer appears to have been unnecessary. Fourth, defendant could not explain why his only option was to give up his Vanda interest for a $340,000 debt, when Vanda produced a pre-tax income of approximately $300,000 per year for years. Finally, at the bench trial, defendant repeatedly referred to "his" interest in the Vanda partnership as if it was a current interest, and he knew the amount of income from "his" portion, long after his interest was transferred to his parents.

Considering these facts in light of the entire record, we are not left with a firm conviction that the trial court made a mistake. The contradictions and holes in defendant's story allowed the trial court to conclude that defendant's testimony was impeached and lacked credibility, and provided facts from which to infer his voluntary reduction in income and bad faith. Moreover, "[t]he trial court [is] in the best position to evaluate the credibility of . . . witnesses, and we will not second-guess the trial court's determination that defendant presented a less than credible accounting of his finances." *Stallworth*, *supra* at 286.

We note that defendant argues on appeal that because plaintiff failed to provide objective, physical evidence that he voluntarily reduced his income, the trial court was bound to believe his story. In support, defendant correctly states that "where unimpeached witnesses testify distinctly and positively to a fact and are uncontradicted, their testimony should be credited . . . ." *Christiansen v Hilber*, 282 Mich 403, 408; 276 NW 495 (1937). However, it is equally true that "[a] witness may be impeached by exhibiting the improbabilities of his story on cross-examination by showing conduct or statements inconsistent with his testimony." *Gilchrist v Gilchrist*, 333 Mich 275, 280; 52 NW2d 531 (1952). Because effective cross-examination, or circumstantial evidence, can impeach a witness' credibility, it has long been the case in this state that a fact finder need not accept as true all uncontradicted testimony. *Yonkus v McKay*, 186 Mich 203, 211; 152 NW 1031 (1915); *Rogers v Detroit*, 340 Mich 291, 297; 65 NW2d 848 (1954). Here, defendant was impeached by his own inconsistent testimony about the reason he transferred his interest in the Vanda partnership to his parents. Furthermore, his testimony that his parents supplement his income and manage his finances, considered alongside his repeated references to the Vanda partnership money as "his" money, create an inference that he transferred the interest to avoid paying child and spousal support. Therefore, the trial court was not bound to believe defendant's story.

B. Spousal Support

Defendant also argues that the trial court erred when it imputed income for purposes of spousal support despite the existence of a prenuptial agreement that provided for spousal support in the amount of 20 percent of defendant's taxable income as shown on his income tax return. Generally, we review a trial court's refusal to enforce a prenuptial agreement for an abuse of discretion. *Rinvelt v Rinvelt*, 190 Mich App 372, 382; 475 NW2d 478 (1991). Prenuptial agreements are generally enforceable under Michigan law, *Reed v Reed*, 265 Mich App 131, 142; 693 NW2d 825 (2005), and the parties stipulated before trial that their agreement should be fully enforced by the trial court.

Additionally, it is well settled that a trial court may also consider the voluntary reduction of income to determine the proper amount of spousal support. *Moore v Moore*, 242 Mich App 652, 655; 619 NW2d 723 (2000). "If a court finds that a party has voluntarily reduced the party's income, the court may impute additional income in order to arrive at an appropriate alimony award." *Id.*; *Healy v Healy*, 175 Mich App 187, 191-192; 437 NW2d 355 (1989). A finding of bad faith is also not stated as a requirement for the imputation of spousal support. *Id.*

Defendant posits three arguments regarding the spousal support award as it relates to the prenuptial agreement. First, defendant argues that the trial court could not impute income under the facts. Second, defendant argues that the trial court disregarded the agreement by not requiring an annual adjustment to the award. Third, defendant argues that the agreement only calls for spousal support based on his actual income as reflected in his tax returns, therefore precluding an imputed amount.

As to the latter issue, "[a]n appellant cannot contribute to error by plan or design and then argue error on appeal." *Munson Medical Center v Auto Club Insurance Association*, 218 Mich App 375, 388; 554 NW2d 49 (1996). Before trial started, plaintiff indicated that imputation of income was an issue before the trial court. Defendant then addressed the imputation issue, but by arguing that the facts did not support imputation, not that imputation would violate the terms of the prenuptial agreement. The parties only referenced the prenuptial agreement to stipulate to the fact that its mathematical formula controlled the amount and duration of spousal support. Because defendant agreed that imputation of income was an issue before the trial court, and because he failed to argue that the *prenuptial agreement* prohibited the imputation of income, he cannot claim on appeal that the trial court erred in considering the issue. *Munson Medical Center, supra*.

As to the second issue, defendant did preserve this issue by arguing – based on the parties' stipulation - that the prenuptial agreement should be enforced. Defendant did not take a position contrary to this in the trial court. Defendant argues to us that the plain terms of the prenuptial agreement required the award to be annually revised based on defendant's taxable income as reflected on his prior year's tax return.

Because no one contests that the prenuptial agreement is enforceable, we will apply its plain and unambiguous terms. The agreement unequivocally provides that the spousal support amount "shall be adjusted every year on the 1st of March by using Glenn's taxable income less the federal income tax paid." The judgment, however, does not allow for this annual adjustment, and thus did not comply with the clear terms of the parties' agreement. That ruling was erroneous, and must be reversed.[2]

[2] It is possible that the trial court concluded that there could always be a revisiting of the spousal support award since it was awarded by the court. *Staple v Staple*, 241 Mich App 562, 569; 616 NW2d 219 (2000). However, nothing indicated that to be the case, and in any event the trial court was required to adhere to the terms of the prenuptial agreement.

Finally, for the reasons stated while addressing the imputation of income for purposes of child support, we hold that the trial court's findings of fact were not clearly erroneous, and that its decision to impute income to defendant was not erroneous.

C. Attorney Fees

Defendant's final argument on appeal is that the trial court erred when it imposed plaintiff's attorney fees on defendant. We disagree. We review a trial court's grant of attorney fees for an abuse of discretion. *Stallworth, supra* at 288. "Findings of fact on which the trial court bases an award of attorney fees are reviewed for clear error; questions of law are reviewed de novo." *Id.*

Under the "American rule," attorney fees will not be awarded unless expressly allowed by statute, court rule, common-law exception, or contract. *Reed, supra* at 164. In divorce actions, attorney fees are not recoverable as of right. *Id.* However, attorney fees are authorized under MCL 552.13 and MCR 3.206(C), and may be awarded "when a party needs financial assistance to prosecute or defend the suit." *Id.* Under MCR 3.206(C)(2), "a party who requests attorney fees . . . must allege facts sufficient to show that (a) the party is unable to bear the expense of the action, and that the other party is able to pay. . ." MCL 552.13 provides: "In every action brought, either for divorce or for a separation, the court may require either party to pay . . . any sums necessary to enable the adverse party to carry on or defend the action, during its pendency."

If we were to follow defendant's lead and consider the trial court's ruling on attorney fees in a vacuum, we would reverse the decision. As to attorney fees, the trial court simply ruled "I will award the plaintiff $20,000 in attorney fees." It would clearly have been preferable had the trial court briefly stated its reasons for the award. MCR 2.517(A)(2). However, reviewing that decision in the context of the findings already made by the trial court, we conclude the award was not an abuse of discretion. *Stallworth, supra*. In particular, the trial court considered on the record both plaintiff's need and defendant's ability to pay before it decided to impute income to defendant, and included a description of plaintiff's attorney fees when it made its factual findings about plaintiff's needs. Immediately following its discussion with respect to spousal support and the imputation of income, the trial court ordered defendant to pay $20,000 in plaintiff's attorney fees. We do not believe the trial court's factual findings with respect to plaintiff's needs and defendant's ability to pay, including the imputation of income discussed above, were clearly erroneous. Furthermore, we find that the imposition of attorney fees was within the principled range of outcomes allowed by MCL 552.13 and MCR 3.206(C)(2) based on those findings. *Stallworth, supra* at 284.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Patrick M. Meter
/s/ Christopher M. Murray